No. 76-1695

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES D. ECKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of affirmance of the court of appeals (Pet. App. C) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1977. The petition for a writ of certiorari was filed on May 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on appeal from an order revoking probation, petitioner was entitled to have his conviction set aside because the district court failed to comply completely with Rule 11 of the Federal Rules of Criminal Procedure in accepting his guilty plea.

STATEMENT

1. An indictment filed on October 16, 1975, in the United States District Court for the Northern District of Ohio charged petitioner and two co-defendants, Richard Dustman and William Olive, with knowing possession of 730 cases of cigarettes that had been stolen while moving in interstate commerce, in violation of 18 U.S.C. 659 and 2. On February 17, 1976, the date on which trial was scheduled to begin, petitioner and his co-defendants appeared before the court with retained counsel for the purpose of withdrawing their previously entered pleas of not guilty and substituting guilty pleas.

At the outset of the hearing, the district court informed each defendant that he had been charged with knowing possession of numerous cases of cigarettes that had been stolen while part of an interstate shipment from Richmond, Virginia, to Columbus, Ohio, and that the maximum penalty upon conviction for that offense was a $5,000 fine and ten years' imprisonment. The court also noted that it had denied defendants' suppression motions the week before and that it was prepared to start their trial by selecting a jury, but that it had just been advised that each of the defendants desired to change his plea to guilty (Pet. App. A-10 to A-11).

After defense counsel had confirmed the court's understanding, the Assistant United States Attorney revealed the existence of a bargain with petitioner whereby, in exchange for his plea of guilty, the court would impose a sentence of two years' imprisonment, suspend the sentence, and place petitioner on probation for five years. In addition, the prosecutor stated that the plea agreement provided that if petitioner did not involve himself in any criminal activity for two years, the government would not oppose a motion to terminate the probationary period

at that time. Petitioner's attorney verified the accuracy of the prosecutor's account of the plea bargain (Pet. App. A-12).

Following an inquiry of co-defendant Dustman regarding the voluntariness of his plea, the court asked petitioner whether he understood the terms of the plea bargain and whether any other promises had been made in exchange for the plea. Petitioner replied that he was aware of the plea bargain, that he had no questions about it, and that his plea was not being offered for any other consideration (Pet. App. A-14). Petitioner also admitted that on July 22, 1975, the date alleged in the indictment, he had knowingly been in possession of a trailer unit containing a stolen shipment of cigarettes (*id.* at A-14 to A-15). After a similar interrogation of co-defendant Olive, the court expressed its satisfaction that the pleas had been entered voluntarily and were supported by an adequate factual basis (*id.* at A-16). It then imposed probationary sentences on petitioner and his co-defendants in accordance with the terms of the plea bargain, but cautioned that probation could be revoked if the men became involved in criminal conduct "or conduct[ed] themselves in a manner which is in violation of the terms and conditions of probation * * *" (*id.* at A-18).

2. Three months later, on May 19, 1976, petitioner's probation officer moved to revoke his probation on the ground that petitioner had associated with convicted felons, contrary to the conditions of the probation order. After an evidentiary hearing held on June 21, 1976, the district court revoked petitioner's probation and ordered him to serve a term of two years' imprisonment. Petitioner appealed, contending for the first time that the inquiry that had been conducted by the trial judge before accepting his guilty plea had been inadequate under Rule 11 of the

Federal Rules of Criminal Procedure. The court of appeals affirmed (Pet. App. A-7 to A-8).

ARGUMENT

Petitioner contends that his conviction must be vacated because the district court, in accepting his guilty plea, failed to establish a sufficient factual basis for the plea or to advise petitioner that the plea would waive his privilege against self-incrimination and his right to a trial by jury at which he could be represented by counsel and could confront the witnessess against him. These claims are insubstantial.

Rule 11(f), Fed. R. Crim. P., provides that the district court shall not accept a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." All this rule requires is that the court undertake an inquiry "factually precise enough and sufficiently specific to develop that [the defendant's] conduct on the occasions involved was within the ambit of that defined as criminal." *Jimenez* v. *United States*, 487 F. 2d 212, 213 (C.A. 5), certiorari denied, 416 U.S. 916. See also *United States* v. *Davis*, 516 F. 2d 574, 577-578 (C.A. 7). Here, the trial judge read petitioner the charge in the indictment, asked whether petitioner believed that he was guilty of the offense, and ascertained that petitioner had been in possession of the stolen shipment and that he had been aware that the cartons of cigarettes were stolen (Pet. App. A-10, A-14 to A-15). This constituted adequate compliance with Rule 11(f). See, *e.g.*, *Bachner* v. *United States*, 517 F. 2d 589, 593 (C.A. 7); *Rosas* v. *United States*, 505 F. 2d 115, 116 (C.A. 5), certiorari denied, 421 U.S. 1001; *Meyer* v. *United States*, 424 F. 2d 1181, 1189 (C.A. 8), certiorari denied, 400 U.S. 853.

Nor is there merit to petitioner's contention that his guilty plea must be overturned because the district court

failed explicitly to mention that the plea waived several rights that would be accorded a defendant at trial. Although the court's inquiry did not recite all of the rights enumerated in Rule 11(c)(3), Fed. R. Crim. P., it is clear that, on the record of this case, that procedural defect does not entitle petitioner to collateral relief from his conviction.[1] As the Court recently noted in *Davis* v. *United States*, 417 U.S. 333, 346, quoting from *Hill* v. *United States*, 368 U.S. 424, 428-429, " 'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." Absent a mistake of constitutional or jurisdictional dimensions, "the appropriate inquiry [is] whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *" (*ibid.*). See also *Stone* v. *Powell*, 428 U.S. 465, 477, n. 10.

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[1]Petitioner neither appealed his conviction nor filed a timely motion to withdraw his guilty plea under Fed. R. Crim. P. 32(d) on the ground that his Rule 11 proceeding had been defective. This claim was not raised until petitioner's appeal from the order revoking his probation, which was filed more than three months after sentencing and thus well after the time in which to take a direct appeal had expired. See Rule 4(b), Fed. R. App. P. Petitioner's request for relief from his conviction therefore should properly be regarded as a collateral attack on the plea. See *Andrews* v. *United States*, 373 U.S. 334, 338; *Hill* v. *United States*, 368 U.S. 424, 430. Hence, there is no conflict between the decision below and *United States* v. *Journet*, 544 F. 2d 633 (C.A. 2), or *United States* v. *Boone*, 543 F. 2d 1090 (C.A. 4), both of which involved a direct appeal of the defendant's conviction.

Even assuming that this appeal is considered to be a direct attack, we disagree with petitioner that the "automatic reversal" rule of *McCarthy* v. *United States*, 394 U.S. 459, which was crafted to ensure compliance with the 1966 version of Rule 11, should be applied to violations of the amended Rule 11, effective December 1, 1975. We have discussed this question in our brief in opposition to the petition for a writ of certiorari in *Scharf* v. *United States*, No. 76-1611, a copy of which we are sending to petitioner.

Petitioner's claims fail to meet this standard, since he alleges not that he was unaware of his right to a jury trial, to confront the witnesses against him, or to refuse to incriminate himself, but only that the district court's inquiry omitted a recitation of those rights. Indeed, any contention by petitioner that he was in fact ignorant of his right to proceed to trial would be particularly unpersuasive on this record: petitioner was represented by retained counsel, the adequacy of whose services is not questioned, and he was present in the courtroom when the judge annnounced that his trial was about to begin and a jury about to be chosen, but that those proceedings would not be necessary in light of the defendants' proposed change of pleas. See *United States* v. *Saft*, C.A. 2, No. 77-1143, decided July 5, 1977, slip op. 4611-4612.

Boykin v. *Alabama*, 395 U.S. 238, is not to the contrary. In that case, the defendant had been convicted following a guilty plea proceeding in which, "[s]o far as the record shows, the judge asked no questions of [the defendant] concerning his plea, and [the defendant] did not address the court." *Id.* at 239. In those circumstances, the Court concluded that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242. Here, by contrast, the record clearly indicates that petitioner's plea, entered with the assistance of counsel, was knowing and intelligent and had been offered in return for the suspended sentence that petitioner eventually received.

Although the Court in *Boykin* listed several constitutional rights that are waived by pleading guilty and that the district court in this case failed to mention, these rights were enumerated merely to emphasize the gravity of the trial judge's responsibility, because a defendant who pleads guilty simultaneously waives these rights as well as

several others. *Boykin* does not suggest that a plea entered in the absence of a complete recitation of these rights is *ipso facto* constitutionally defective. See *Fontaine* v. *United States*, 526 F. 2d 514, 516 (C.A. 6), certiorari denied, 424 U.S. 973; *Todd* v. *Lockhart*, 490 F. 2d 626, 628, n. 1 (C.A. 8); *United States* v. *Sherman*, 474 F. 2d 303, 305 (C.A. 9).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1977.

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[2]As the Court stated in *Brady* v. *United States*, 397 U.S. 742, 747-748, n. 4: "The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily," not that the trial judge list every conceivable right waived by a plea of guilty.

*The Solicitor General is disqualified in this case.

DOJ-1977-07